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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 28 2009
SRC 07 800 26569

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

In this decision, the term "prior counsel" shall refer to [redacted] who represented the petitioner at the time the petitioner filed the petition. The term "counsel" shall refer to the present attorney of record.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the sciences. At the time he filed the petition, the petitioner was a postdoctoral research scholar at the University of Iowa. He subsequently began working at the National Institute of Mental Health (NIMH). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for the classification sought, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel, copies of previously submitted documents, and materials relating to prior witnesses and the petitioner's current work.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner claims eligibility for classification as an alien of exceptional ability in the sciences. The record readily establishes that the petitioner, whose occupation requires at least a bachelor's degree and who holds a doctoral degree, qualifies as a member of the professions holding an advanced degree. The

sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

The regulation at 8 C.F.R. § 204.5(k)(4)(ii) requires that a petitioner seeking to apply for the exemption must submit Form ETA-750B, Statement of Qualifications of Alien (or equivalent sections of ETA Form 9089), in duplicate. The record does not contain this required document, and therefore the petitioner has not properly applied for the national interest waiver. The director, however, did not raise this issue. We will, therefore, review the matter on the merits rather than leave it at a finding that the petitioner did not properly apply for the waiver.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on July 30, 2007. Prior counsel stated that the petitioner "has successfully and rapidly conducted research in the environmental and health industry, which has resulted in the compounds which are largely needed for a large number of biological and environmental studies by the researchers." Prior counsel added: "Due to his expertise and exceptional ability in the field . . . he has commanded a salary equal to his level of knowledge." The record shows that the beneficiary's salary was $33,000 per year at the time of filing. The petitioner submitted nothing to show that this is a particularly high salary in his field.

The petitioner's *curriculum vitae* listed seven items under the heading "Publications," but only two of the items were published articles. Each of the other five items was described as a "manuscript in preparation."

Several letters accompanied the initial filing of the petition. [redacted] of the University of Akron, Ohio, stated:

> [The petitioner] conducted his doctoral dissertation research under my direction. . . . He is a bright, creative, and vigorous young scientist, and can be expected to enjoy a highly productive professional career. . . .
>
> [The petitioner] gained considerable experience in synthetic and physical organic chemistry and proved to be a thoughtful and accomplished experimentalist. [The petitioner's] dissertation is mainly focused on the reactivity of polycyclic aromatic hydrocarbons and other electron-rich aromatic compounds with hypervalent iodine reagents. . . .
>
> In my opinion, [the petitioner] has the right professional qualifications and personal gifts for an outstanding scientific career. . . . I am convinced that [the petitioner] will be an important contributing member of the U.S. scientific community.

[redacted] at the University of Iowa, stated:

> [The petitioner's] training and research skills are unique and exceptional. . . .
>
> During his time at the University of Akron . . . he was involved in numerous, highly challenging synthetic endeavors. Most of his research was aimed at modifying existing

> organic molecules to obtain value added products for pharmaceutical and medical applications. For example, he . . . developed a method for the thiocyanation of polycyclic and heteroaromatic systems and established a synthetic approach for the biscarbonylalkylation of polycyclic hydrocarbons and thiophenes. This research is unprecedented and finally allows researchers worldwide to easily synthesize . . . compounds [that] are of great interest as pharmaceutical intermediates for the synthesis of penicillin, cephalosporin and many other drug molecules. . . .
>
> [The petitioner] joined my research team in 2006 and currently makes unique contributions to several projects. . . . [H]e has developed new and urgently needed synthetic approaches to a group of environmental contaminants called Polychlorinated Biphenyls (PCBs). . . . These compounds are needed for a large number of biological and environmental studies by the researchers of the Iowa Superfund Basic Research Program [ISBRP]. Thanks to [the petitioner's] expertise and tireless effort, many of the study compounds needed by Superfund researchers are now available in large quantities.

University of Iowa [redacted] described the petitioner's postdoctoral work in technical detail, and stated that the petitioner "is a rare chemist with a unique combination of experience in both the chemical and biological sciences. . . . I am confident that this bright scientist will contribute greatly to the various fields of science and to the growth of American society."

University of Kentucky Associate [redacted] stated:

> I know [the petitioner] through a collaboration with [redacted] at the University of Iowa in an effort to develop fluorous probe molecules (dyes) for biomedical applications. . . . The potential applications of the dyes are in Fluorous solid phase extractions (F-SPE), liquid crystal displays, thermal transfer printing and contrast agents. The newly available dyes have provided valuable scientific insights into the process of forming materials for F-SPE that could not have been gained by any other means.
>
> . . . Apart from synthetic achievements, [the petitioner] also has deep understanding and working experience in toxicology experiments with animal models. . . .
>
> As a graduate student at The University of Akron, [the petitioner] accomplished innovative research in the fields of synthetic organic and medicinal chemistry. . . .
>
> [The petitioner] has the ingenuity and knowledge to synthesize drug leads and thereby aid in the design and development of new and potent pharmacological agents. Also his research at [the] University of Iowa in toxicology will definitely be helpful in understanding the mechanism of carcinogenesis and oxidative stress, leading towards remedies for acute exposure to environmental health hazards.

The remaining three witnesses provided specific details about the petitioner's professional career, including his most recent, not-yet-published work, but did not explain how they learned this information. [redacted] of the University of California, San Diego, stated that the petitioner "has provided many individual PCB congeners and PCB metabolites to several projects" and, as a doctoral student, "prepared many . . . novel synthetic materials [that] will have impact in the development of functionalized aromatic systems." [redacted] stated that the petitioner "is a highly gifted chemist whose unique combination of knowledge, skills and experience is rare among research scientists."

[redacted] Senior Scientific Officer at Expicor Pharma Private Ltd., Hyderabad, India, contended that the petitioner "was one of the best TAs of his graduate studies in the department of chemistry [at] The University of Akron." Such a claim presupposes substantial knowledge of the abilities of all the other teaching assistants in that department, but [redacted] did not claim ever to have spent time at the University of Akron. [redacted] described the petitioner's work in technical detail and concluded that the petitioner "is involved in research with importance which addresses environmental concerns. He will undoubtedly play a key role in conducting cutting-edge research in the fields of fundamental organic, medicinal, environmental chemistry and toxicology."

[redacted] of Saxion University of Applied Sciences, Enschede, the Netherlands, discussed the petitioner's work in technical detail and stated that the petitioner's "findings prove his versatility in different fields of chemistry research."

On August 4, 2008, the director instructed the petitioner to establish the extent, if any, to which other researchers have cited the petitioner's published work. The director stated that the petitioner "must establish . . . a past record of specific prior achievement that justifies projections of future benefit to the national interest."

In response to the notice, the petitioner submitted four additional letters, copies of publications, and documentation of the petitioner's new job at NIMH. The petitioner's work at NIMH, relating to age-related macular degeneration, did not begin until well after the petition's filing date. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). Therefore, we cannot consider the petitioner's work at NIMH except to acknowledge that the petitioner continues to work in areas related to his prior work.

University of Iowa Professor [redacted] stated that the petitioner "made very substantial scholarly contributions to . . . health-related projects within the ISBRP. . . . He . . . has made exceptional contributions to the advancement of synthetic organic chemistry, medicinal chemistry, and toxicology."

[redacted], a research scientist at Trius Therapeutics, Inc., San Diego, California, stated that the petitioner's "fluorous tagging of PCBs and PBDEs coupled with ^{19}F-NMR for the straight-forward detection of metabolites in toxicological studies . . . [is] a milestone discovery in toxicology." Discussing the petitioner's work at the University of Akron, [redacted] asserted that the petitioner's

"findings in hypervalent iodine chemistry are exceptional and proved valuable in both industry and academia."

[redacted] of Bionovo, Inc., a pharmaceutical company in Emeryville, California, stated that the petitioner's doctoral and postdoctoral work is "novel" with a number of potential industrial and research applications.

A number of witnesses stated that the petitioner's work had been cited, but they did not provide specific figures. The petitioner submitted copies of three articles with independent citations of his work. The petitioner submitted other articles which he stated were related to his research, but he did not claim that the articles contain citations of his work.

The director denied the petition on February 21, 2009, stating that the petitioner had not adequately shown that his "modest publication record" has had substantial impact in his field. The director acknowledged the witnesses' letters, but found that the record lacked objective, documentary evidence to support their statements.

On appeal, counsel argues that the director "failed to recognize" the "substantial merit" and "national . . . scope" of the petitioner's ongoing work. The director, in the decision, did not deny or dispute the intrinsic merit or national scope of the petitioner's occupation. At issue was the relative significance of the petitioner's work in what is, overall, an important field.

Counsel takes issue with the director's observation that the petitioner must establish eligibility at the time of filing. This policy, however, is taken directly from the regulation at 8 C.F.R. § 103.2(b)(1). The director does not have the discretion to disregard the regulations, even if it would benefit the petitioner. *See Reuters Ltd. v. F.C.C.*, 781 F.2d 946, (C.A.D.C.,1986) (an agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned). We cannot justify a finding that, because the petitioner began working at NIMH in 2008, he was already eligible for the national interest waiver in 2007. Qualifications gained after the filing date cannot cause a previously ineligible alien to become eligible after the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). A detailed discussion of the petitioner's work at NIMH would serve no useful purpose in this decision, and we will not conclude that NIMH's decision to hire the petitioner is, itself, strong evidence of the petitioner's prior reputation.

Counsel argues that the petitioner failed to follow *Matter of New York State Dept. of Transportation*, because that decision's evidentiary "factors **do not include evidence of influence**" (counsel's emphasis). Counsel then acknowledges that the decision does require "a past history of demonstrable achievement with some degree of influence on the field as a whole" (*Id.* at 219, n.6), but does not explain why the director erred by requiring evidence of that influence.

Counsel quotes at length from previously submitted witness letters. For the most part, these quotations are highly technical descriptions of the petitioner's work, sometimes followed by the

summary conclusion that the work described is of great importance. General assertions to the effect that the petitioner made "a milestone discovery" or that "his findings . . . proved valuable in both industry and academia" do not answer the question of how, exactly, the petitioner's work has advanced knowledge or produced new practical applications. It cannot suffice simply to describe the petitioner's work in technical terms that are unintelligible to non-specialists, and then pronounce that work to be of seminal importance in the field.

The petitioner's exhibits on appeal include evidence that a number of the petitioner's witnesses, and his current supervisor at NIMH, [redacted] have published large quantities of heavily cited articles. [redacted] seven top articles, by themselves, show approximately 500 citations between them. This evidence serves to illustrate the gulf between these highly accomplished researchers and the petitioner, who finished his last degree less than a year before he filed the petition.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.